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Attorney-Client Privilege--Requiring A Preliminary Showing of Relevancy and Need in Grand Jury Proceedings

Daniel J. O'Donnell

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CURRENT ISSUES

ATTORNEY-CLIENT PRIVILEGE - REQUIRING A PRELIMINARY SHOWING OF RELEVANCY AND NEED IN GRAND JURY PROCEEDINGS*

I. INTRODUCTION

The power of the grand jury is necessarily broad in order to perform its "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."¹ Generally, this power includes the ability to subpoena witnesses and documents, absent any showing of relevancy and need.² The grand

* Mr. O'Donnell has received the 1986 New York State Bar Legal Ethics Award based in part on his authorship of this article.

¹ *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972). The grand jury frequently is described as an agency designed to function as a "shield and a sword." W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 8.1 (1984). It is used as a "shield" to protect against mistaken prosecutions by determining if an indictment should be issued. *See United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983). In making that determination, it screens the prosecutor's case to make sure that there is sufficient evidence to bring charges against the accused. *See id.* The grand jury also functions as a "sword" in its ability to uncover evidence not previously available to the government and thereby secure convictions that might otherwise not be obtained. *See In re Pantojas*, 628 F.2d 701, 704 (1st Cir. 1980).

² *See Blair v. United States*, 250 U.S. 273, 281-82 (1919). The Court in *Blair* noted that the grand jury has the power to subpoena witnesses and documents. *Id.* The Court stated that the grand jury's authority to resort to compulsory process had been recognized in England as early as 1612, and the inquisitorial function of the grand jury was well established at the time of the adoption of the Constitution. *Id.* at 279-80. The *Blair* Court concluded:

[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of pro-

jury's power, however, is not without limitation.³ Grand jury subpoenas are subject to the assertion of constitutional, statutory, and common law privileges.⁴

The attorney-client privilege is one such limitation on the subpoena power of the grand jury.⁵ Generally, the privilege aims to insure that clients receive the best possible legal advice and representation by protecting, from involuntary disclosure, certain confi-

priety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Id. at 282.

Traditionally, the grand jury has been accorded *carte blanche* in its inquiries into criminal activities. *See* *United States v. Calandra*, 414 U.S. 338, 343 (1974). The *Calandra* Court stated: "The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Id.* Thus, the grand jury's investigative powers must be broad if they are to insure fair and effective law enforcement. *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972); *Costello v. United States*, 350 U.S. 359, 363-64 (1956).

In this country, the fifth amendment requires a grand jury indictment for the prosecution of serious crimes. *See* U.S. CONST. amend. V. The fifth amendment reads in part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." *Id.*

³ *See* *Brown v. United States*, 359 U.S. 41, 49 (1959). The powers of a grand jury are supervised by a judge of the district court, *In re Grand Jury Matters*, 751 F.2d 13, 17 (1st Cir. 1984) (citing *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)); *see In re Pantojas*, 628 F.2d 701, 705 (1st Cir. 1980), from which their subpoena and contempt procedures are derived. *See Pantojas*, 628 F.2d at 705. To control any abuse of discretion, the district court is given the power to police the grand jury's subpoena powers and, on motion, may "quash or modify the subpoena 'if compliance would be unreasonable or oppressive.'" *Grand Jury Matters*, 751 F.2d at 17 (citing FED. R. CRIM. P. 17(c)).

Grand jury subpoenas are also limited by the assertion of any recognized constitutional, statutory, or common law privilege. R. McNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 7.05 at 119 (1982). The privileges available to witnesses depend on the law of the jurisdiction where the grand jury is empaneled. *Id.*

⁴ R. McNAMARA, *supra* note 3, § 7.05 at 119; *see, e.g., Fisher v. United States*, 425 U.S. 391, 405 (1976) (fifth amendment privilege against self-incrimination may bar enforcement of subpoena); *In re Grand Jury Proceedings* (Jones), 517 F.2d 666, 672 (5th Cir. 1975) (common law attorney-client privilege upheld in grand jury proceeding); *Beach v. Shanley*, 62 N.Y.2d 241, 245-46, 465 N.E.2d 304, 306, 476 N.Y.S.2d 765, 767 (1984) (reporters protected by state "shield law" from disclosure of sources to grand jury).

⁵ R. McNAMARA, *supra* note 3, § 7.05 at 119; *see In re Grand Jury Proceedings* (Jones), 517 F.2d 666, 672 (5th Cir. 1975); *In re Grand Jury Subpoena* (Legal Servs. Center), 615 F. Supp. 958, 964-65 (D. Mass. 1985).

Professor Wigmore stated that the attorney-client privilege is applicable when confidential legal advice of any kind is sought from an attorney by a client. 8 J. WIGMORE, EVIDENCE § 2292 at 554 (McNaughton rev. 1961). These communications are permanently protected from disclosure by the attorney at the client's insistence unless the client waives the protection. *Id.*

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dential communications between an attorney and his client.⁶ The purpose of the privilege is to encourage the client to make complete disclosure to his attorney, without fear that the information may be used against him at a later time.⁷ The privilege, however, does not protect every communication between the attorney and his client, but rather, only protects those confidential communications properly made within the scope of the relationship.⁸

⁶ *Fisher v. United States*, 425 U.S. 391, 403 (1976). The attorney-client privilege is applicable from the moment a person seeks to obtain legal assistance. *See id.*; *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

In *United Shoe*, District Judge Wyzanski set forth the classic formulation of the attorney-client privilege. *See United Shoe*, 89 F. Supp. at 358-59. According to Judge Wyzanski, the privilege applied if:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id.

⁷ *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege is the oldest of privileges protecting confidential communications. *Id.* It was accepted as early as the reign of Elizabeth I. *See* 8 J. WIGMORE, *supra* note 5, § 2290 at 542-45. At that time, the purpose of the privilege was to prevent the attorney from being required to take an oath and testify against his client, thereby violating the attorney's honor as a gentleman. *Id.* Originally, the privilege belonged to the attorney, but it is generally accepted today that the privilege belongs to the client. Comment, *Grand Jury - Attorney-Client Privilege and the Right to Counsel For the Party Under Investigation*, 19 WAKE FOREST L. REV. 487, 494-95 (1983).

Today, the most frequently urged justification for the attorney-client privilege is to "encourage clients to make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403 (1976); *see* 8 J. WIGMORE, *supra* note 5, § 2291 at 545; § 2306 at 590. In *United States v. Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977), the United States Court of Appeals for the Ninth Circuit explained the rationale underlying the attorney-client privilege as follows:

[I]n our legal system the client should make full disclosure to the attorney so that the advice given is sound, so that the attorney can give all appropriate protection to the client's interest, and so that proper defenses are raised if litigation results. The attorney-client privilege promotes such disclosure by promising that communications revealed for these legitimate purposes will be held in strict confidence. . . . Thus, the attorney-client privilege is central to the legal system and adversary process.

Id. at 1355.

⁸ *See In re Walsh*, 623 F.2d 489, 494 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980). In *Walsh*, the Court of Appeals for the Seventh Circuit reversed an order quashing grand jury subpoenas directing an attorney to testify in an investigation of the disappearance, under suspicious circumstances, of a former client. *Id.* at 495. The court's rationale was that the privilege was not a blanket privilege. *Id.* at 494. Whatever privilege existed would have to be asserted in response to each question. *Id.* The privilege would not apply to facts that the

The assertion of the attorney-client privilege in defense of a grand jury subpoena *duces tecum*⁹ has caused some disagreement among the courts.¹⁰ All courts recognize some form of the common law privilege protecting communications made in confidence for the purpose of obtaining legal advice.¹¹ The problem arises, however, when the subpoena is directed at communications that traditionally have not been protected by the privilege, such as a client's identity or fee information.¹²

Although limitations on grand jury power are normally not allowed absent a claim of privilege,¹³ the district court, in the exer-

attorney had independently observed, such as the appearance of his client. *Id.*

It is not sufficient to show only that an attorney-client relationship existed, *see United States v. Goldfarb*, 328 F.2d 280, 281-82 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964). Rather, the proponent of the privilege must show that the privilege is applicable to the specific communications sought to be discovered. *Id.* The attorney-client relationship does not create an automatic "cloak of protection . . . draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client." *Id.*

Communications made to an attorney in furtherance of criminal or fraudulent activities are not protected by the privilege. *In re Grand Jury Proceedings* (Pavlick), 680 F.2d 1026, 1028 (5th Cir. 1982). In these cases, the government must make a *prima facie* showing that the attorney was retained in order to promote criminal or fraudulent activity. *Id.*; *see also United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939) ("It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged.").

⁹ Subpoena *duces tecum* is defined as "a process by which the court, at the instances of a party, commands a witness who has in his possession or control some document or paper that is pertinent to the issues of a pending controversy, to produce it at the trial." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

¹⁰ *See, e.g., In re Grand Jury Proceedings* (Schofield), 721 F.2d 1221, 1222 (9th Cir. 1983) (attorney-client privilege protects only those confidential communications made in order to obtain legal assistance); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) (attorney-client privilege should be construed as narrowly as possible); *In re Grand Jury Witness* (Salas), 695 F.2d 359, 361-62 (9th Cir. 1982) (accounts receivable records, time records, bills, retainer agreements, and records of payments held to contain both privileged and non-privileged material); *In re Grand Jury Proceedings* (Jones), 517 F.2d 666, 674 (5th Cir. 1975) (certain communications not normally protected are under the attorney-client privilege).

¹¹ *See supra* note 6 and accompanying text.

¹² *See supra* note 10; *see also In re Walsh*, 623 F.2d 489, 494-95 (7th Cir. 1980) (attorney could be compelled to testify as to number of times he met with client and whether attorney had instructed client to appear before grand jury).

¹³ *See In re Grand Jury Subpoena* (Legal Servs. Center), 615 F. Supp. 958, 963-64 (D. Mass. 1985); *see also In re Grand Jury Proceedings* (Schofield), 486 F.2d 85, 93 (3d Cir. 1973) (government required to show relevancy of each requested document to investigation and that documents not sought for any improper purpose). *Cf. United States v. Orsini*, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977) (newsgatherer entitled to a qualified privilege in New York before having to disclose confidential sources in criminal proceeding).

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cise of its supervisory power, may quash a subpoena that is "unreasonable or oppressive."¹⁴ This supervisory power is derived from several sources.¹⁵ First, the district court has the power to call the grand jury into existence.¹⁶ Secondly, the district court may issue subpoenas¹⁷ and has the duty to enforce them.¹⁸ In the context of subpoenas to attorneys for information regarding their clients, there are mixed opinions as to whether this supervisory power allows the district court to impose a preliminary showing on the prosecutor prior to issuance of the subpoena.¹⁹

Most courts take the view that the government is under no obligation to make a preliminary showing of relevancy or need when subpoenaing an attorney's files or requiring him to testify.²⁰ Under this view, the only communications protected are those proven by the attorney or the client to fall within the traditional notion of the privilege.²¹

Another way in which this problem has been addressed has been to require the government to make a preliminary showing of some sort before compelling disclosure of these documents.²² A federal district court has required the government to make a preliminary showing of relevancy and reasonable need when subpoenaing the records of an attorney whose client is a witness before a grand jury.²³ Although the communications are not considered

¹⁴ FED. R. CRIM. P. 17(c).

¹⁵ See *infra* notes 16-18 and accompanying text.

¹⁶ 18 U.S.C. § 3331 (1983); FED. R. CRIM. P. 6(a).

¹⁷ FED. R. CRIM. P. 17(a).

¹⁸ 28 U.S.C. § 1826(a) (1983).

¹⁹ See *In re Grand Jury Subpoena* (Legal Servs. Center), 615 F. Supp. 958, 963-65 (D. Mass. 1985). But see *In re Grand Jury Proceedings* (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983) (no preliminary showing necessary); *In re Special, Sept. 1983, Grand Jury* (Klein), 608 F. Supp. 538, 541 (S.D. Ind.), *aff'd*, *In re Klein*, 776 F.2d 628 (7th Cir. 1985) (government under no obligation to show relevancy or need; however, attorney-client privilege may be invoked).

²⁰ See *In re Special, Sept. 1983, Grand Jury* (Klein), 608 F. Supp. 538, 541 (S.D. Ind.), *aff'd*, *In re Klein*, 776 F.2d 628 (7th Cir. 1985); *In re Grand Jury Proceedings* (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1222 (9th Cir. 1983).

²¹ See *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1223 (9th Cir. 1983); *In re Grand Jury Proceedings* (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Special, Sept. 1983, Grand Jury* (Klein), 608 F. Supp. 538, 541 (S.D. Ind.), *aff'd*, *In re Klein*, 776 F.2d 628 (7th Cir. 1985).

²² See *infra* note 30 and accompanying text.

²³ *In re Grand Jury Subpoena* (Legal Servs. Center), 615 F. Supp. 958, 963-64 (D. Mass.

privileged, this added protection is given in the interests of protecting the attorney-client relationship.²⁴

The former treatment of these subpoenas is followed by the majority of the circuits.²⁵ These circuits allow protection for those confidential communications proven to be privileged.²⁶ The party seeking to invoke the privilege, however, bears the burden of showing the existence of the attorney-client relationship and the confidential nature of the communication.²⁷ No preliminary showing of relevancy and need is required before issuance of a grand jury subpoena to an attorney.²⁸ All that is needed for the issuance of the subpoena is a showing of legitimate purpose which is de-

1985). In *Legal Servs. Center*, the federal district court required a showing of relevancy and need when documents and records of an attorney were subpoenaed. *Id.* at 964. In its decision, the district court relied upon the Second Circuit Court of Appeals' decision in *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985). See *Legal Servs. Center*, 615 F. Supp. at 963-64. Recently, the Court of Appeals for the Second Circuit, *en banc*, vacated the *Doe* decision. See *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir.) (*en banc*), cert. denied, 106 S. Ct. 1515 (1986). It is submitted, however, that the district court's decision and reasoning is still valid because of the First Circuit Court of Appeals' decision in *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980).

In *Pantojas*, the Court of Appeals for the First Circuit expressly declined to adopt any specific procedure and impose it on the district courts. *Pantojas*, 628 F.2d at 704-05. Instead, the court endorsed the concept that the district courts should control the grand jury, *id.* at 705, and that they should feel free to require the government to show relevancy and need. *Id.* It is suggested that *Pantojas* would allow the district courts reviewed by the First Circuit Court of Appeals to adopt the original rationale of the *Doe* panel.

²⁴ See *In re Special Grand Jury No. 81-1* (Harvey), 676 F.2d 1005, 1010, vacated on other grounds, 697 F.2d 112 (4th Cir. 1982); *In re Grand Jury Subpoena* (*Legal Servs. Center*), 615 F. Supp. 958, 964 (D. Mass. 1985).

²⁵ See *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221 (9th Cir. 1983); *In re Grand Jury Proceeding* (Freeman), 708 F.2d 1571 (11th Cir. 1983); *In re Special*, Sept. 1983, Grand Jury (Klein), 608 F. Supp. 538 (S.D. Ind.), *aff'd*, *In re Klein*, 776 F.2d 628 (7th Cir. 1985).

²⁶ *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1223 (9th Cir. 1983); *In re Grand Jury Proceeding* (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Special*, Sept. 1983, Grand Jury (Klein), 608 F. Supp. 538, 542 (S.D. Ind.), *aff'd*, *In re Klein*, 776 F.2d 628 (7th Cir. 1985).

²⁷ *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1223 (9th Cir. 1983); *In re Grand Jury Proceedings* (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Special*, Sept. 1983, Grand Jury (Klein), 608 F. Supp. 538, 542 (S.D. Ind.), *aff'd*, *In re Klein*, 776 F.2d 628 (7th Cir. 1985). A party seeking to invoke the attorney-client privilege in defense of a subpoena *duces tecum* must first establish that an attorney-client relationship exists. *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980). Once such a relationship is established, a claim of privilege must be made for each question and/or document requested. *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983). "[A] blanket claim of privilege is unacceptable." *Id.*

²⁸ See *supra* notes 20-21 and accompanying text.

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rived from a presumption that the government obeys the law.²⁹

The approach which requires a preliminary showing before subpoenaing an attorney whose client is a witness before the grand jury places the initial burden on the government before allowing access to information concerning the attorney-client relationship.³⁰ The rationale supporting this qualified protection is two-fold. First, the disclosure by an attorney of any communication between himself and his client may have a chilling effect on the attorney-client relationship.³¹ Clients may be reluctant to confide in the attorney if the information revealed in apparent confidence

²⁹ See *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1223 (9th Cir. 1983). Initially, when the government seeks information through the use of a subpoena, it must demonstrate a legitimate interest in the requested information. *Id.* This interest is presumed to be legitimate because there is a presumption that the government obeys the law. *Id.*; *In re Grand Jury Proceedings* (Hergenroeder), 555 F.2d 686, 686 (9th Cir. 1977). Relying on that presumption, the *Hergenroeder* court found no reason to require any preliminary showing by the government, and refused to create unnecessary delays in the grand jury process. *Id.*

³⁰ See *In re Grand Jury Proceedings* (Schofield I), 486 F.2d 85, 93 (3d Cir. 1973). In *Schofield I*, the court required the government to make some showing by affidavit that the documents sought were relevant to an investigation being conducted by a grand jury. *Id.* The documents must be properly within the jurisdiction of the grand jury and cannot be sought for an improper purpose. *Id.* Once the government had sufficiently established need and relevancy, the burden shifted to the defendant "to demonstrate the applicability of one or more privileges." *Id.* See *In re Grand Jury Subpoena* (Legal Servs. Center), 615 F. Supp. 958, 964 (D. Mass. 1985).

³¹ *In re Special Grand Jury No. 81-1* (Harvey), 676 F.2d 1005, 1009, *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982). The *Harvey* decision was vacated because the subject of the grand jury investigation took flight, not because the reasoning of the decision was unsound. See *In re Special Grand Jury No. 81-1* (Harvey), 697 F.2d 112, 113 (4th Cir. 1982).

The court in *Harvey* noted that if an attorney complied with the subpoena, there was the possibility that a "substantial chilling effect" on client-attorney communications would be likely, especially if the end result were the indictment of the client. See *Harvey*, 676 F.2d at 1009 n.4. See generally Note, *Grand Jury - Attorney-Client Privilege and the Right to Retain Counsel for the Party Under Investigation - In re Special Grand Jury No. 81-1* (Harvey), 19 WAKE FOREST L. REV. 487 (1983). "If the attorney complies with the subpoena and appears before the grand jury behind closed doors, a substantial chilling effect on truthful communications from the client to the attorney thereafter would be likely, especially if the client is indicted." *Harvey*, 676 F.2d at 1009 n.4.

The precedential value of the *Harvey* decision has been questioned by the Fourth Circuit, see *United States v. Murchower*, 718 F.2d 1093 (4th Cir. 1983), however, the *Harvey* rationale was relied upon by the district court in deciding *In re Grand Jury Subpoena* (Legal Servs. Center), 615 F. Supp. 958 (D. Mass. 1985). Since the decision was vacated for reasons totally unrelated to the subpoena, see *Harvey*, 697 F.2d at 113, its precedential value should not be impaired. Cf. *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1222 n.1 (9th Cir. 1983) (court free to adopt *Harvey* rationale but declined to do so).

may be subject to disclosure before a grand jury.³² As a result, the courts should deem proper an exercise of their discretionary supervisory power over federal grand juries in the interest of preserving the attorney-client relationship.³³

A second rationale for this protection is that a subpoena served upon an attorney in regard to information in the attorney's possession may infringe upon a person's sixth amendment right to be represented by counsel of one's choice.³⁴ This is because the subpoena may result in the disqualification of the attorney should his testimony be used at a subsequent trial.³⁵

The fundamental difference between these two approaches is in who bears the initial burden of coming forward to prove the validity or invalidity of the subpoena.³⁶ In determining who should bear this initial burden, the courts should balance the public interest in effective grand jury investigations against both the attorney-client privilege and the right to counsel of one's choice.³⁷

³² See *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 674 (5th Cir. 1975). The purpose of the attorney-client privilege would be undermined if lawyers could be subpoenaed without some safeguards. *Id.* Clients are not adequately protected if prosecutors can compel disclosure of documents by attorneys whenever that attorney represented a suspected individual. *Id.* But see *Harvey*, 676 F.2d at 1013 (Murnaghan, J., dissenting). In his dissent, Judge Murnaghan stated that there was no merit in the argument that a subpoena served on a lawyer would have a chilling effect on the attorney-client relationship. *Harvey*, 676 F.2d at 1013 (Murnaghan, J., dissenting). He stated that "[a] client who loses faith in his lawyer because the lawyer complies with the law . . . has adopted an unreasonable stance." *Id.* (Murnaghan, J., dissenting). It is submitted that, although this stance may well be unreasonable, it is naive to assume that the client would not feel betrayed if his own attorney produced information which subsequently became the basis of an indictment.

³³ See *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1012 (4th Cir. 1982); see also FED. R. CRIM. P. 17(a), (c); cf. *In re Grand Jury Matters*, 751 F.2d 13, 17 (1st Cir. 1984) (grand jury subpoenas subject to supervisory powers of judges).

³⁴ *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 254-57 (2d Cir.) (*en banc*) (Cardamone, J., dissenting), cert. denied, 106 S. Ct. 1515 (1986). The Federal Constitution guarantees to an individual the right to be represented by counsel of one's own choice. See U.S. CONST. amend. VI. The sixth amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

³⁵ *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968, 973 (2d Cir. 1985), vacated, 781 F.2d 238 (2d Cir.), cert. denied, 106 S. Ct. 1515 (1986).

³⁶ See *supra* notes 20-23 and accompanying text.

³⁷ Cf. *Branzburg*, 408 U.S. at 690-91 (1972) (balanced public interest with newsgatherer's nondisclosure privilege and first amendment rights); *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985) (balanced public interest against sixth amendment right), vacated, 781 F.2d 238 (2d Cir.), cert. denied, 106 S. Ct. 1515 (1986); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1009-10 (4th Cir. 1982) (balanced public interest against attorney-client privilege).

Attorney-Client Privilege

The proper maintenance of both the attorney-client relationship and the investigative function of the grand jury is essential to the orderly administration of the law.³⁸ It is suggested that although these competing interests cannot be completely harmonized, the most equitable balance would be attained by requiring that the prosecutor make a preliminary showing of relevancy and need to the court before compelling disclosure by the attorney of this type of information. By analogizing a grand jury subpoena directed at legal fees and client identities, material generally not privileged,³⁹ to a grand jury subpoena directed at statements made during an attorney-client relationship in furtherance of a crime or fraud, statements also considered unprivileged,⁴⁰ this article will attempt to illustrate the reasonableness of a judicially required preliminary showing in this subpoena context.

Although a judicial remedy could reasonably be implemented, it is further submitted that should the judiciary decline to take a

³⁸ *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960). See *United States v. Mandujano*, 425 U.S. 564, 571-72 (1976). The Court in *Mandujano* recognized that the power of the grand jury is necessarily broad, but that it is limited by the assertion of a sufficiently important competing interest. *Id.* Compare *United States v. Calandra*, 414 U.S. 338, 344 (1974) (grand jury's investigative powers must be broad to properly perform intended function) with *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege oldest common law privilege and serves to promote public interests and ends). See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1504-09 (1985) (courts must balance benefits of disclosure with cost to society of compelled disclosure).

³⁹ *In re Grand Jury Proceeding* (Schofield), 721 F.2d 1221, 1222 (9th Cir. 1983); *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975). Although not generally privileged, the courts have stated that in certain circumstances, information concerning client identities and fee arrangements cannot be disclosed: 1) the "legal advice" exception, see *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984) (client identity and fee information not privileged unless disclosure impairs attorney's ability to give informed legal advice); 2) the "last link" exception; and 3) the "communication rationale" exception. See *Baird v. Koerner*, 279 F.2d 623, 633 (9th Cir. 1960). In *Baird*, the court stated: "If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors." *Id.* at 633. But see *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983) (client identity and fee information not privileged even if disclosure may evidence wrongdoing by client).

⁴⁰ *Clark v. United States*, 289 U.S. 1, 14 (1933); *In re Grand Jury Subpoena Ducés Tecum*, 773 F.2d 204, 207 (8th Cir. 1985) (quoting *In re Berkley & Co., Inc.*, 629 F.2d 548, 553 (8th Cir. 1980)); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re Grand Jury Proceedings* (Twist), 689 F.2d 1351, 1352 (11th Cir. 1982). Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (attorney may reveal "confidences" of client to prevent commission of crime).

more active supervisory role in the grand jury process, then state and federal legislatures should act to pass laws which would require a preliminary showing of relevancy and need in order to preserve the attorney-client relationship. This requirement will not only protect against deterioration of the attorney-client privilege but also control any actual or perceived abuses of the prosecutor through the grand jury.

II. ANALYSIS

A. *Necessity for Grand Jury Reform*

Historically, the grand jury as an institution has been held in the highest regard by the judiciary.⁴¹ It has been seen as serving the dual function of insuring thorough and speedy investigation of criminal activity as well as protecting the public from having unfounded criminal charges filed against them.⁴² The historical perception of the grand jury as a protector of the innocent has become the subject of increasing skepticism.⁴³ Certain commentators have gone so far as to call for the abolition of the grand jury.⁴⁴ This outcry has been prompted by actual and perceived⁴⁵ abuses

⁴¹ See *United States v. Mandujano*, 425 U.S. 564, 571 (1976); *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Costello v. United States*, 350 U.S. 359, 362 (1962).

⁴² See *supra* note 1 and accompanying text.

⁴³ See *United States v. Mara*, 410 U.S. 19, 23-24 (1973) (Douglas, J., dissenting) (grand jury no longer protects citizens but is tool of prosecutor); *Id.* at 45-47 (Marshall, J., dissenting) (questioning assumption of grand jury independence and noting possibility of prosecutorial abuses). The Court in *United States v. Dionisio* conceded that the historical perception of the grand jury might be inaccurate. *United States v. Dionisio*, 410 U.S. 1, 17 (1973). The Court stated that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, . . ." but declined to place restrictions on the grand jury's investigative power. *Id.* See also Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263, 1265-75 (1976) (detailing historical evolution of federal grand jury system, including prosecutorial abuses). See generally L. CLARK, *THE GRAND JURY* (1975) (grand jury abuses throughout history with emphasis placed on misuse during Nixon administration).

⁴⁴ Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973). Campbell contended that the prosecutor should be given the power for, and responsibility to, initiate criminal prosecutions. *Id.* at 180. "Prosecutions should be commenced upon the filing of an information signed by the prosecutor, and be followed by a probable cause hearing before a judicial officer who would determine whether there is sufficient evidence to allow the prosecution to continue to trial." *Id.*

⁴⁵ Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1982) (lawyer should avoid appearance of impropriety); A.B.A. CODE OF JUDICIAL CONDUCT Canon 2 (1972) (judge

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of the grand jury system which are inherent in the nature of the institution as it exists today.⁴⁶ "Overzealous" prosecutors⁴⁷ seeking political advancement, or political administrations with improper motives,⁴⁸ often misuse the grand jury as a tool of harassment.⁴⁹ These considerations suggest that the presumption that "the government obeys the law"⁵⁰ should be done away with, and that some preliminary showing related to proper purpose should be required.⁵¹

should avoid appearance of impropriety). Both lawyers and judges are instructed to avoid even the appearance of impropriety so as to strengthen the public's faith in the legal profession. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-1 (1982); A.B.A. CODE OF JUDICIAL CONDUCT Commentary (1972). Although it has been argued that abuses of the grand jury are exaggerated and that criticism of the grand jury process is "superficial," see *United States v. Mandujano*, 425 U.S. 564, 571 (1976), it is submitted that it is proper to require some safeguards against improper use of the grand jury process in order to strengthen the public's faith in the criminal justice system, as well as the legal entities empowered to fairly administer the law.

⁴⁶ See D. EMERSON, *GRAND JURY REFORM: A REVIEW OF KEY ISSUES* 14 (1983). The grand jury had historically functioned as a unit created to investigate criminal activity based upon personal beliefs and leads. See Campbell, *supra* note 44, at 175. Today, it can not serve this purpose because we no longer live in isolated communities and people very seldom have enough knowledge of the suspect to return an indictment without the "assistance of the prosecution." *Id.* at 177-78. Thus, the grand jury is an arm of the prosecution since the only means of gathering and sorting information are under the control of the prosecutor. *Id.* The potential of harassment inherent in an unrestrained grand jury inquiry, referred to as a "fishing expedition", was noted and criticized by Justice Marshall, see *United States v. Mara*, 410 U.S. 19, 48 (1973) (Marshall, J., dissenting).

⁴⁷ Cf. *In re Grand Jury Matters*, 751 F.2d 13, 19 (1st Cir. 1984) (categorizing harassment as possible "overzealousness"). The district court found that the actions of the United States Attorney constituted harassment. See *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984). The appellate court refused to affirm this finding, labelling the prosecutor's action possible "overzealousness." *In re Grand Jury Matters*, 751 F.2d at 19.

⁴⁸ See L. CLARK, *THE GRAND JURY* 31-38 (1975). In his book, Clark claimed that certain presidential administrations, particularly John Mitchell of the Nixon administration, had politicized the Department of Justice and, consequently, the grand jury process. *Id.*

⁴⁹ See *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984); see also *supra* notes 46-47 (historic abuses of grand jury).

⁵⁰ *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977); *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686, 686 (9th Cir. 1977).

⁵¹ *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973); *In re Grand Jury Subpoena (Legal Servs. Center)*, 615 F. Supp. 958, 964 (D. Mass. 1985). See *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1011, *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982). But see *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686, 686 (9th Cir. 1977). "In view of the presumption that the government obeys the law . . . [there is] no reason to inject into routine grand jury investigations the delay and imposition upon district courts that will be opened up by a rule institutionalizing these disclaiming affidavits." *Id.* at 686.

B. Preliminary Showing of Relevancy and Need - Not Unreasonable

Requiring a preliminary showing has been rejected by a number of courts as placing an unreasonable burden on the grand jury's investigative powers.⁵² This rejection has been partially based on the Supreme Court holdings in *United States v. Dionisio*⁵³ and *United States v. Mara*.⁵⁴ In both cases, the Court held that a preliminary showing of reasonableness was unnecessary before issuance of subpoenas for voice and handwriting exemplars.⁵⁵ These decisions are distinguishable from cases involving an attorney-client relationship. In *Dionisio* and *Mara*, the Court held that a subpoena for voice and handwriting exemplars was not a violation of the fourth amendment.⁵⁶ The Court stated that these subpoenas were not unreasonably broad and therefore did not infringe on any constitutional rights.⁵⁷ Thus, the Supreme Court did not find any reasonable justification for imposing the delays resulting from a preliminary showing upon the grand jury.⁵⁸

Although the sixth amendment does not attach at the grand jury stage,⁵⁹ certain aspects of the attorney-client relationship that are protected under the sixth amendment would be permanently lost or impaired if the attorney was subpoenaed.⁶⁰ Any delay

⁵² See *United States v. Dionisio*, 410 U.S. 1, 17 (1972) (mini-trials and preliminary showings impede public's interest in expeditious administration of law); *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (no preliminary showing required for subpoenas to reporters because of excessive interference with grand jury).

In the context of grand jury subpoenas aimed at attorneys in an ongoing attorney-client relationship, a majority of the circuits have also rejected any requirement of a preliminary showing. See *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 243-44 (2d Cir.), cert. denied, 106 S. Ct. 1515 (1986); *In re Klein*, 776 F.2d 628, 634 (7th Cir. 1985); *In re Grand Jury Proceeding in Matter of Freeman*, 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1223 (9th Cir. 1983).

⁵³ 410 U.S. 1 (1973).

⁵⁴ 410 U.S. 19 (1973).

⁵⁵ *Dionisio*, 410 U.S. at 15; *Mara*, 410 U.S. at 22.

⁵⁶ *Dionisio*, 410 U.S. at 15; *Mara*, 410 U.S. at 22.

⁵⁷ *Dionisio*, 410 U.S. at 15; *Mara*, 410 U.S. at 23 (Brennan, J., concurring).

⁵⁸ *Dionisio*, 410 U.S. at 15; *Mara*, 410 U.S. at 22.

⁵⁹ See *In re Grand Jury Subpoena Upon Doe*, 781 F.2d 238, 243-44 (2d Cir.), cert. denied, 106 S. Ct. 1515 (1986).

⁶⁰ See *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1009, vacated on other grounds, 697 F.2d 112 (4th Cir. 1982). The Court of Appeals for the Fourth Circuit stated in *Harvey* that by subpoenaing an attorney "there is a strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed." *Id.* at 1009. If the attorney should appear before a grand jury and testify, then the possibility

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which might be caused by a preliminary showing could not be considered unreasonable since this delay may effectively keep the attorney-client relationship intact.⁶¹

The Court of Appeals for the Third Circuit, in *In re Grand Jury Proceedings (Schofield I)*,⁶² required a preliminary showing before the issuance of any subpoenas.⁶³ In *Schofield I*, the court required a preliminary showing that the items requested were relevant to the grand jury proceedings and that the investigation was properly within its jurisdiction and not sought primarily for another purpose.⁶⁴ It is submitted that a proper standard for a preliminary showing, in this instance, would be relevancy and need. The "relevancy" prong would be satisfied by a very minimal showing⁶⁵ and all that would be required to show "need" would be a good faith effort by the prosecutor to procure the information elsewhere.⁶⁶

that the client will be less than candid with his attorney will be dramatically increased. *Id.* at 1009 n.4.

The district court of New Hampshire went further than the *Harvey* court, stating that to refer to this adverse effect as chilling would be mild, *see In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984), and "[t]o permit it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice floes, bereft of the succor of constitutional safeguards." *Id.*

In the event that the attorney does not comply with a grand jury subpoena, he can be found in contempt by the district court empowered to enforce the subpoena, 28 U.S.C. § 1826 (1982), and can then be subject to other penalties which will disrupt the representation of his client's cause. *See In re Grand Jury Subpoena (Legal Servs. Center)*, 615 F.Supp. 958, 964 (D. Mass. 1985); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 946 (E.D. Pa. 1976).

⁶¹ *Cf. United States v. Dionisio*, 410 U.S. 1, 15-16 (1972); *United States v. Mara*, 410 U.S. 19, 21-22 (1972) (no fiduciary relationship threatened by subpoena). It is submitted that in order to conform with the reasonable expectations of the attorney and his client, an attorney should not be compelled to give potentially damaging information concerning his client to a grand jury unless this is shown to be necessary.

⁶² 486 F.2d 85 (3d Cir. 1973).

⁶³ *Id.* at 93.

⁶⁴ *Id.*

⁶⁵ *See In re Morgan*, 377 F. Supp. 281, 285 (S.D.N.Y. 1974). In defining relevancy for purposes of a grand jury investigation, the court stated: "Relevancy in the context of a Grand Jury proceeding is not probative relevancy, for it cannot be known in advance whether the document produced will actually advance the investigation. It is rather a relevancy to the subject matter of the investigation." *Id.*

⁶⁶ *Cf. Fed. R. Civ. P. 26(b)(3)* (when adversary's work product discoverable). The work product doctrine codified in Rule 26 states that a party to a civil action can discover documents and other tangible items prepared in anticipation of adversarial proceedings, but "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* Although this rule by its terms only applies to civil actions, the courts have recognized its applicability in the grand jury

This burden, far from being unreasonable, would assure that the subpoena has been properly issued and enforced.⁶⁷

C. Crime-Fraud Analogy

The concept of a preliminary showing before enforcement of a subpoena to compel disclosure of unprivileged information is not new.⁶⁸ For example, before a subpoena is issued to obtain communications believed to be in furtherance of criminal or fraudulent activity, the government must make a preliminary *prima facie* showing of the impropriety.⁶⁹ Although these communications are not considered privileged, the showing is required in deference to the special relationship between the attorney and his client.⁷⁰

context. See *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. 943, 946-47 (E.D. Pa. 1976). Since the attorney's records are not covered by the work product doctrine, see FED. R. Civ. P. 26(b)(3), it is submitted that a showing of reasonable need, rather than substantial need, would be adequate to protect the interests involved.

⁶⁷ See *supra* notes 30-33 and accompanying text.

⁶⁸ See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 (8th Cir. 1984) (required *prima facie* showing that advice was obtained to further criminal or fraudulent activity); *In re Grand Jury Proceedings* (Schofield I), 486 F.2d 85, 93 (3d Cir. 1973) (required preliminary showing of relevancy for each item requested); *In re Grand Jury Subpoena* (Legal Servs. Center), 615 F.Supp. 958, 964 (D. Mass. 1985) (required to show necessity of information sought).

⁶⁹ *Clark v. United States*, 289 U.S. 1, 14 (1933). The Court, per Justice Cardozo, in discussing the crime-fraud exception to the attorney-client privilege, stated: "There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in." *Id.* See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re Grand Jury Proceedings* (Twist), 689 F.2d 1351, 1352 (11th Cir. 1982); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). For background information concerning the crime-fraud exception, see in general 8 J. WIGMORE, EVIDENCE §§ 2298, 2299 (McNaughton rev. 1961); Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708, 710 (1961).

⁷⁰ *Cf. Clark v. United States*, 289 U.S. 1, 15 (1933). Justice Cardozo explained the test in *Clark*:

There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. . . . "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud" (quoting *O'Rourke v. Darbishire*, [1920] A.C. 581, 604). To drive the privilege away, there must be 'something to give colour to the charge;' there must be '*prima facie* evidence that it has some foundation in fact.'

Id.

This *prima facie* showing suggests that the courts do not want to arbitrarily interfere in the attorney-client relationship. *Cf. United States v. Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1972) ("protection [provided by the right of counsel of one's choice] goes no further than preventing arbitrary dismissal of the chosen attorney"), *rev'd on other grounds*, 465 U.S. 259 (1984). Thus, by requiring some preliminary showing, like the *prima facie* showing of criminal or fraudulent activity, the courts can prevent the arbitrary dismissal of an attor-

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Since this added protection is given to materials clearly not privileged, it is submitted that there is no reason not to require a preliminary showing when subpoenaing an attorney to obtain the client's identity or legal fees charged, information which also has been held to be unprivileged.⁷¹ The protection of the attorney-client relationship is sufficient reason to warrant this conclusion.⁷²

D. State and Federal Legislative Action

If the judiciary should fail to take proper action to protect the attorney-client relationship, then it is submitted that the state and federal governments should enact statutes to further this goal.

In *Branzburg v. Hayes*,⁷³ the Supreme Court held that there was no constitutional or common law privilege preventing a reporter

ney. Cf. *In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1010-11 (court must balance public interest with the preservation of attorney-client relationship), *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982).

⁷¹ See *supra* note 39 and accompanying text.

⁷² See *supra* notes 24 & 70 and accompanying text. Cf. *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947). In *Hickman*, the court recognized a privilege for the work product of an attorney. *Id.* The court concluded that the policy supporting the attorney-client privilege, that of encouraging full disclosure, required that a privilege also protect work product from discovery. *Id.* at 222-23. The work product privilege, according to the court in *Hickman*, protected "intangible things, the results of the lawyer's use of his tongue, his pen, and his head, for his client." *Id.* at 223.

In 1970, the *Hickman* ruling was partially codified in Fed. R. Civ. P. 26(b)(3). The rule states in part:

Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id.

The work product doctrine has also been applied in criminal and grand jury proceedings. See, e.g., *United States v. Noble*, 422 U.S. 225, 227 (1975) (applicable to criminal proceedings); *In re* Grand Jury Investigations (Sturgis), 412 F. Supp. 943, 947 (E.D. Pa. 1976) (applicable to grand jury proceedings).

The basic rationale supporting the work product doctrine "is to assure that an attorney is not inhibited in his representation of his client by fear that his files will be open to scrutiny upon demand of an opposing party." *In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977). It is submitted that the same rationale is applicable whenever an attorney is forced to testify against his client and a preliminary showing of relevancy and need should be required to safeguard against unwarranted intrusions into the attorney-client relationship.

⁷³ 408 U.S. 665 (1972).

from revealing the source of his information to a grand jury.⁷⁴ The Court rejected any requirement that a preliminary showing be made before the grand jury could subpoena a reporter to disclose the source of his information.⁷⁵ Despite this decision, a number of state legislatures recognized the importance of protecting the reporter's first amendment rights and created a statutory privilege for the reporter.⁷⁶ Under these "shield" laws, the reporter generally is not required to disclose the source of his information.⁷⁷ In some states, the reporter may withhold the information received as well as the identity of his source.⁷⁸

Supplementing state shield laws are regulations promulgated by the Department of Justice which prevent infringement upon freedom of the press resulting from the arbitrary issuance of grand jury subpoenas to reporters.⁷⁹ These guidelines require a prosecutor to make "all reasonable attempts"⁸⁰ to obtain information from other sources before subpoenaing a journalist.⁸¹ Violation of these regulations is grounds for disciplinary action.⁸² Similar guidelines have been proposed governing the issuance of subpoenas to lawyers and are presently under consideration by the De-

⁷⁴ *Id.* at 690-91, 698-99.

⁷⁵ *Id.* at 708.

⁷⁶ See, e.g., CAL. EVID. CODE § 1070 (Supp. 1986) (reporter privileged from disclosing source of information); N.J. STAT. ANN. §§ 2A:84A-21 (Supp. 1985) (same); N.Y. CRV. RIGHTS LAW § 79-h (McKinney 1986) (same). For a collection of all the shield statutes in effect, see Note, *Shield Statutes: A Changing Problem in the Light of Branzburg*, 25 WAYNE L. REV. 1381, 1386 n.40 (1979).

⁷⁷ See MINN. STAT. ANN. § 595.023 (West Supp. 1984) (prohibiting disclosure of materials which would tend to identify sources). See *Dumez v. Houma Mun. Fire and Police Civil Serv. Bd.*, 341 So.2d 1206, 1209 (La. App. 1976).

⁷⁸ See, e.g., NEV. REV. STAT. § 49-275 (1985); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1985).

⁷⁹ 28 C.F.R. § 50.10 (1985). The purpose of this regulation is obvious from the language of its preamble: "This policy statement is . . . to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." *Id.*

⁸⁰ *Id.* § 50.10(b).

⁸¹ *Id.*

⁸² *Id.* § 50.10(n). Violation of the provisions of this regulation constitute grounds for disciplinary action but are not intended to create any legally enforceable right in any person. *Id.* While this action by the Justice Department is commendable, it is submitted that it is insufficient because the subpoena will be legally enforceable even though the prosecutor violated the guidelines. Cf. *United States v. Schulmann*, 466 F. Supp. 293, 297-98 (S.D.N.Y. 1979) (interpreting similar regulation as insufficient reason to dismiss indictment).

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partment of Justice.⁸³

These legislative and administrative actions were adopted to combat the chilling effect that subpoenas had on the reporter's ability to effectively gather information from confidential sources.⁸⁴ It is suggested that similar action should be taken to stifle the chilling effect that these subpoenas have on the attorney-client relationship.⁸⁵ The very nature of this relationship dictates that it should be given as much, if not more, protection than the relationship between the reporter and his source.⁸⁶

⁸³ See 9 U.S. ATTORNEYS' MANUAL 9-2.161(a). The guidelines call for prior judicial approval before a subpoena can be issued. *Id.* Before a judge approves a subpoena, according to the guidelines, there must be a finding that: 1) the information sought is not protected from disclosure by the lawyer-client privilege or the work product doctrine and it is relevant to the investigation; 2) the purpose is not primarily to harass the lawyer or the client; and 3) there is no other feasible alternative to obtain the information. *Id.*

A different set of guidelines has recently been approved by the Association of the Bar of the City of New York. See Frank, *Att'y Subpoenas*, 72 A.B.A. J., March 1, 1986, at 32, 33. These standards direct that: 1) lawyer subpoenas be supported by an "affidavit of necessity;" 2) prosecutors seek information from lawyers on a voluntary basis first; and 3) U.S. Attorneys give prior written approval for the issuance of a subpoena. *Id.*

The highest court of Massachusetts has even gone so far as to bar prosecutors from issuing subpoenas without prior judicial approval. S.J.C. RULE 3:08, PF 15. The rule states:

It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.

Id.

This rule withstood a challenge in federal court when the district court for the District of Massachusetts held "that Supreme Judicial Court Rule 3:08 Prosecution Function 15 is valid as not in conflict with federal law. . . ." See *United States v. Mass. Bar Ass'n*, Civil Action No. 85-4809-Z (D. Mass. Feb. 28, 1986) (LEXIS, Genfed library, Dist file).

⁸⁴ See 28 C.F.R. § 50.10 (1985). The preamble to the statute states:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of process, whether civil or criminal, which might impair the newsgathering function.

Id.

⁸⁵ See Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 25 AM. CRIM. L. REV. 95, 125 (1985).

⁸⁶ Cf. E. CLEARY, *McCORMICK ON EVIDENCE* § 87, at 204-05 (3d ed. 1984). Both the work product doctrine and the attorney-client privilege are firmly established in the common law. *Id.* No such privilege has been recognized for a reporter. See *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972).

CONCLUSION

Documents relating to client identities and legal fees paid to an attorney are clearly not within the attorney-client privilege.⁸⁷ Neither, though, are statements made in furtherance of a crime or fraud.⁸⁸ If the latter form of non-privileged communications warrant a *prima facie* showing of impropriety, then it is not only reasonable, but desirable, for the judiciary to require a preliminary showing of relevancy and need before compelling disclosure of these documents. This has the laudable effect of protecting the attorney-client relationship from unreasonable strains. In the absence of judicial action under its supervisory powers over federal grand juries, one must hope that appropriate legislation will be passed to effectuate the commendable purpose of protecting the attorney-client relationship.

Daniel J. O'Donnell

⁸⁷ See *supra* note 39 and accompanying text.

⁸⁸ See *supra* note 40 and accompanying text.